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AUTHOR Kane, Peter E.
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ABSTRACT

The original United States Constitution of 1787, specifically in the communication related provisions of Article 1, deals extensively with communication issues, and provides an illustration of the tensions that existed between freedom and suppression. Philosophically, there was support for freedom of expression while in real world events there was an inclination to seek to suppress unfavorable communication. Two of the communication sections of Article 1 contain this tension within themselves. Freedom of communication is supported in that the activities of Congress are to be made public. However, suppression is possible in that activities may be kept secret. As the language of the provision makes clear, the grant of a copyright can "promote" communication, but it is also clear that the grant of an "exclusive right" can impede communication. Finally, in section 6 of Article 1 the drafters of the Constitution express their clear support for freedom of communication as essential to democratic decision-making. (MM)

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FREEDOM OF EXPRESSION IN THE ORIGINAL CONSTITUTION: A BICENTENNIAL REVIEW

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Peter E. Kane
State University of New York,
College at Brockport

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Careful students of United States history have surely been appalled by much of the nonsense that has surrounded the bicentennial celebration of the Constitution. First there was the big "bicentennial" Fourth of July bash as though the Constitution and the Declaration of Independence were the same document. A recent survey discovered that more than a third of Americans did not know the difference--a confusion that last summer's media hype did nothing to clarify. Then there have been the many essays on the rights of Americans appearing both the popular press and scholarly papers which ignore the fact that the Bill of Rights (the first 10 amendments to the Constitution) are not part of the original document drafted 200 years ago. We will not celebrate the bicentennial of the Bill of Rights until 1991 (if the Rhenquist court has left us with anything to celebrate). In this paper, I do not intend to talk about either the Declaration of Independence or the Bill of Rights.

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I

One of the best known works dealing with the climate for freedom of expression in this country 200 years ago is Leonard Levy's Freedom of Speech and Press in Early American History: Legacy of Suppression published by Harvard University Press in 1960. In this work Levy forcefully made the case that, as his subtitle suggests, the tradition out of which the Constitution arose was one that supported the suppression of free expression rather than its expansion. In particular Levy noted that a major source of acts of suppression was the colonial assembly. These legislative bodies demonstrated a willingness to punish those whose words were viewed as an offense to the dignity of those assemblies.

Since 1960, Levy's work has been subject to much critical comment. For example, in 1977 Louis Campbell pointed out that Levy's conclusions misrepresent the actual situation because of Levy's excessive dependence on examples drawn from Massachusetts, New York, and Pennsylvania rather than colonies such as Rhode Island and Connecticut where the abuses Levy reported did not occur (From Small Acorns Mighty Oaks Grow: The Legislatures and Free Speech in Colonial Connecticut and Rhode Island," Free Speech Yearbook, 1977). In an admirable example of responsible scholarship Levy has thought carefully about these criticisms, expanded upon his original research, and has now published Emergence of a Free Press, (Oxford University Press, 1985), which the careful reader of both books

will recognize as a remarkable major retraction of much of Levy's original position.

However, even in Levy's new work, one consistent theme is still present, namely the ongoing tension between freedom and suppression. Philosophically there was support for freedom of expression while in real world events there was an inclination to seek to suppress unfavorable communication. It is in the context of this tension that the communication related sections of Article I of the Constitution will be considered. These communication considerations are found in sections 5, 6, and 8. In light of Levy's original 1960 critique, it should be noted that Article I deals with the legislative branch of government--the Congress.

II

Section 5 of the first Article of the Constitution says in part, "Each House shall keep a Journal of its Proceedings, and from time to time publish same, excepting such Parts as may in their Judgment require Secrecy;" This clause not only reflects the tension between freedom and suppression but also the traditional British tension that existed between the King and Parliament. The first part of the clause recognizes the obligation of Congress to keep the public informed about its deliberations and actions. This obligation is a clear expression of the democratic concept of open governmental

decision-making. It recognizes that Congress has been created to do the public's business and that therefore the public has a right to be fully informed about what Congress does. Congress is accountable to the public, and that accountability is provided for by this requirement that the public be kept informed about the actions of Congress. Even the casual follower of last summer's Iranscam hearings could not fail to see the connection between secrecy and the subversion of democratic values.

The second half of this clause tells a different story. It recognizes that government may be involved in activities that it wishes to conceal from the general public. The right of secrecy conferred by this phrase is a blanket one. Congress may keep anything secret that Congress judges to require secrecy. The Constitution is silent about the grounds to be used for making such judgments. It is unclear from Madison's diary that the drafters of the Constitution recognized that the need for political consensus to implement effectively any secrecy rule would place real limits on this highly authoritarian and undemocratic grant of power. The fact that, except for limited national security matters, Congress does not conceal actions from the public (as the executive branch does so frequently) should probably be seen as both the need for political consensus and a commitment to democratic principles.

This secrecy phrase of Section 5 is one that demands thoughtful consideration although it is often overlooked. It

is here that two nondemocratic impulses can be seen. It should be remembered that the constitutional convention in Philadelphia in 1787 was a proceeding that took place in secret--a fact that Representative Henry Hyde and others of the lunatic fringe right like to recall in an attempt to justify the secret government scandals of the Reagan administration. One impulse for secrecy was the traditional British parliamentary fear of those in authority who may disapprove of what is being done. The Constitution writers were clearly concerned about the reactions of those in authority--the government officials of the several colonies. The second impulse is the one we more easily understand today--fear of adverse reaction by the general public. Both impulses were reflected in the secrecy of the constitutional convention, and both are surely reflected in the secrecy phrase of Section 5.

III

Section 6 of Article I deals with the rights of members of Congress. It says,

> They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

The last clause of this section is a broad grant of a special

privilege giving unlimited freedom of expression to members of Congress functioning in their official capacities. They cannot be charged with defamation, obscenity, or any other communication crime. The purpose of such a broad grant is clear. It allows members of Congress to speak their minds no matter how unpopular their statements might be. The drafters of the Constitution here took a clear stand in favor of free, uninhibited and robust debate in an open marketplace of ideas. The importance of this clear commitment cannot be overstated.

While such communication promotes democratic values, we can recognize, as the Constitution drafters may not have, that this privilege is subject to abuse. We need only recall the late Senator from Wisconsin, Joseph McCarthy, with his baseless accusations of Communist Party membership pronounced from the protected sanctuary of the well of the United States Senate chamber. Perhaps the drafters of the Constitution, assuming that our elected representatives would be persons of good will and integrity, failed to recognize the possibility of such abuse.

IV

Finally, Article I, Section 8 in its list of the powers granted to Congress includes the power

> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective

Writings and Discoveries.

In other words, Congress is given the right to grant copyrights. Such grants do, in fact, inhibit freedom of communication. The owner of a copyright has the right to control distribution and use of the communication product that the copyright protects. You and I cannot legally copy and distribute communication owned by someone else without that owner's permission to do so. The restrictive nature of such exclusive ownership can be seen in the current suit by J.D. Salinger to prevent the publication of a biography, J. D. Salinger: A Writing Life by Ian Hamilton. The grounds for this suit are that the work makes use without permission of Salinger's unpublished letters. A restraining order granted to Salinger by the Federal court has been upheld by the Second Circuit Court of Appeals. Thus copyright laws can suppress communication.

The grant of a copyright is at the same time a grant that enhances the flow of communication by providing incentives to the creators and producers of communication products. Few outside of us academics are willing to expend the time and energy to create without the prospect of financial reward, and even we appreciate those occasional rewards. No publisher or producer of communication products will undertake the often great expense of production without the prospect of recovering those expenses and perhaps profiting from the enterprise. By protecting the property rights of creator and producer,

copyright encourages the production of communication products that enhance the marketplace of ideas.

V

In summary, it can be seen that the original constitutional document of 1787 deals extensively with communication issues. These communication related provisions can be found in Article I and provide a good illustration of the tensions that existed at the time between freedom and suppression--tensions that Leonard Levy has discussed in both his studies of freedom of expression in early American history. Two of the communication sections of Article I contain this tension within themselves. Freedom of communication is supported in that the activities of Congress are to be made public. However, suppression is possible in that activities may be kept secret. As the language of the provision makes clear, the grant of a copyright can "promote" communication, but it is also clear that the grant of an "exclusive right" can impede communication. Finally in Section 6 of Article I the drafters of the Constitution express their clear support for freedom of communication as essential to democratic decision-making.